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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 of the	)	**CC Docket No. 92-115**
Commission's Rules Governing	)	
the Public Mobile Services	)	

REPLY COMMENTS OF PAGING NETWORK, INC.

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July 5, 1994

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Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

To: The Commission

REPLY COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc. ("PageNet"), through its attorneys, hereby replies to comments on the Commission's Further Notice of Proposed Rule Making in the above-captioned proceeding (*"Further Notice"*).

Overall, this docket involves a comprehensive rewrite of Part 22 and, in particular, in this *Further Notice* proceeding, represents an attempt by the Commission to streamline licensing procedures in the 931 MHz paging band, reduce processing and review burdens on the Commission's staff, and expedite service to the public by qualified providers. In the *Further Notice*, the Commission proposes rules to govern future 931 MHz application and processing procedures, mechanisms for addressing the current backlog of applications in certain markets, and methods for licensee selection to be used where applications are MXd. In so doing, the Commission acknowledges its duty, consistent with the Omnibus Budget Reconciliation Act of 1993 (the *"Budget Act"*), to minimize the number of mutually exclusive applications, and to use

competitive bidding procedures, wherever legally permissible in cases of mutual exclusivity, so that spectrum ultimately is licensed to those who value it most.

I. SUMMARY OF POSITION

PageNet is committed to using the spectrum as efficiently as possible to provide high quality messaging services to the public as expeditiously as possible. Therefore, in its comments, PageNet supported the Commission's goals in the *Further Notice* and, in particular, its efforts to break the processing logjam that has delayed licensing and buildout of the remaining RCC frequencies in many of the largest metropolitan markets.

Specifically, PageNet set forth in its comments an analytical framework for assessing the Commission's proposals, the key elements of which are to: minimize and simplify regulation; apply a cost/benefit analysis to each proposed regulation; speed new service to the marketplace; and minimize litigation and delay. It identified and strongly urged Commission adoption of three basic licensing principles that flow naturally and compellingly from this analytical foundation:

- licensing should be done on a market area basis, rather than transmitter-by-transmitter;
- applications should be processed on a first-come, first-served basis; and

- applications should be frequency-specific.[1/]

Industry comments submitted in response to the *Further Notice* confirm the merits of PageNet's premises and proposals. Several commenters strongly supported market-area licensing for 931 MHz paging operations. While most were opposed to frequency-specific applications, their stated concerns that the procedure would increase the number of mutually exclusive applications and strike filings are amply assuaged by the regulatory mechanisms that PageNet proposes which substantially reduce, if not totally eliminate, the risk of conflicts and abuse of the application process.

Therefore, the Commission should adopt those proposals which will enhance the licensing process, such as frequency-specific application procedures. It should not adopt proposals, such the 30-day filing window and the highly-restrictive definition of license modifications, which would have the effect of stalling buildout by legitimate operators by increasing the number of MXd and strike applications, thereby delaying system construction and increasing the cost of service to subscribers. In this regard, the Commission should do as it originally proposed in this proceeding and commence licensing on a first-come, first-served basis as soon as possible.

1/ PageNet also urged the use of an outside entity to coordinate frequency assignments in the same way that 929 MHz paging applications are coordinated by NABER.

II. DISCUSSION

A. Market-area Licensing.

In its Further Notice of Proposed Rule Making in the Regulatory Parity proceeding, the Commission requested comment on the appropriateness of licensing 900 MHz paging systems on a market-area basis rather than transmitter-by-transmitter as is currently done.[2/] While it did not raise the subject specifically in the *Further Notice* in this docket, the concept of market area licensing is so central to the matters on which the Commission did request comment that it must be addressed.

PageNet has a long history of supporting licensing on a wide-area basis, dating back to its initial comments in this proceeding and reiterated at length in its most recent comments. It is, in PageNet's view, the keystone of the licensing scheme which should be adopted to carry the RCC industry forward into the next century. To a very significant degree, market-area licensing moots the arguments raised by commenters concerning termination of the block frequency allocation scheme, since licensees would be assured in advance of their frequency assignments throughout their market-wide service areas. Similarly, it assuages concerns about mutually exclusive applications and strike filings since service areas would be pre-determined.

In short, market area licensing is the threshold prerequisite of the licensing scheme of the future. Combined with first-come, first-served application procedures and safeguards to preclude

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2/ FNPRM in GN Docket No. 93-252, released May 20, 1994, at ¶ 37.

speculation, including buildout requirements and refiling limitations,[3/] it will assure that consumers receive the most cost-effective service, that meets their wide-area coverage demands, at the earliest possible time.[4/]

In its support of market area licensing, PageNet has consistently recommended the use of MTAs to define market areas. In response to comments on the proposals put forth in the *Further Notice*, PageNet has modified its view of the licensing area that would be appropriate and supports state-wide licensing as proposed by AirTouch Paging.[5/] While it may be that state borders cut through certain population centers which paging providers seek to serve with seamless wide-area systems, it is assumed that licensees would continue to be able to design and develop such systems by obtaining state-wide licenses in each of the states involved.

To transition to the market area licensing, PageNet suggests that existing applicants and licensees be given a fixed period of time (e.g., 18 months) in which to build out systems which meet some minimum transmitter requirement,[6/] without being subject to

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3/ The use of competitive bidding procedures serves as a further disincentive to speculation.

4/ In addition, it would reduce processing burdens on the Commission by eliminating the need for the Commission to license new sites or approve modifications of existing sites within the licensed service area. Such an approach is consistent with the proposal in the *Further Notice* to eliminate licensing of inner cell sites within cellular systems. *Further Notice* at ¶7.

5/ AirTouch Paging at 10.

6/ Requiring construction of a minimum number of transmitters is both logical

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competing applications on those frequencies except from existing licensees within the state. Licensees who did not meet this requirement would not be awarded a state-wide license.[7/] Subsequent to the expiration of the build out time period, new applicants would be permitted to apply for unlicensed frequencies within any state, but only if they filed for and committed to timely build the minimum number of transmitters required by incumbents.

Where there is more than one incumbent licensed in a state, those existing licensees would be entitled to expand their service areas based on current 70-mile protection criteria on a first-come, first-served basis, but no new applicants would be authorized unless the incumbents failed to satisfy their build out requirements.[8/]

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and reasonable and it conforms to the earned exclusivity rules the Commission recently adopted for the 929 MHz paging service. PageNet suggests that the minimum number of transmitters required to establish state-wide rights would be dependent on the number of top-30 or top-50 cities within the state. Whatever the number, it must represent a substantial commitment on the part of the licensee to build a legitimate system.

7/ There are very few circumstances where one or a nominal number of transmitters could provide effective service to the public, but the Commission should consider waivers in those comparatively rare circumstances. PageNet also suggests that the Commission prohibit the use of 1 watt transmitters, for purposes of satisfying its construction requirements.

8/ Precedent for such a scheme exists in the Commission's cellular rules. See, §§ 22.6 and 22.902 of the Rules. Initial cellular systems were granted a five-year period during which the systems could be expanded within the MSAs and RSAs, free from the filing of competing applications. Subsequently, the Commission adopted rules for the acceptance, processing, and selection of applications for service to those areas into which systems had not expanded and which remained unserved. See, Amendment of

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Defining service areas by geographic region rather than contours will enable carriers to create seamless, integrated paging networks which allow subscribers to receive high quality service. At the same time, such services would be made available to the public as expeditiously as possible and at reduced cost to carriers and the Commission. PageNet believes that market area licensing is the best method through which to achieve these goals.

B. Frequency-Specific Applications.

The Commission proposed in the *Further Notice* to abandon the practice whereby 931 MHz paging frequencies are assigned by the Commission and to require instead that applicants specify in their applications the proposed frequency of operation. PageNet strongly supported this proposal. Those commenters who opposed it were concerned that it would lead, in the future, to strike and speculative application filings, or they objected to the prospect of a further public notice period during which now-pending applications would be subjected for a second time to petitions to deny.9/

As previously stated, the antidote for speculation and filing abuses is a first-come, first-served application procedure. The

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Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the cellular service, 6 FCC Rcd 6185, 6197 (1991).

9/ AirTouch Paging at 4, PCIA at 6, SkyTel at 7 and 10. "Pending" applications are those enumerated by the Commission in the *Further Notice*, including applications that have been granted, dismissed or denied and are the subject of petitions for reconsideration or applications for review.

likelihood that two applications would be filed on the same day, for the same frequency, for locations within 70 miles of one another, is extremely remote. Moreover, market-area licensing as well as the competitive bidding process create a substantial barrier and/or disincentive to speculators. What opens the door and throws out the welcome mat to those who would abuse the system and are not serious in their intent to construct systems and provide service to the public is not frequency-specific applications but, instead, the opportunity afforded by a 30-day filing window to react to the filings of others. First-come, first-served protects the legitimate filer from such ambush.[10/]

In its comments, PCIA expressed concern that amended pending applications would be unjustifiably subjected for a second time to petitions to deny. To address this issue, PageNet submits that the Commission could treat amendments filed to specify a frequency as Section 22.23(g) amendments and exempt them from further public

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10/ Many of the recent comments filed in the *Parity Proceeding* by parties who have had experience with first-come, first-served procedures confirm that it works. See e.g., Comments of American Mobile Telecommunications Association, Inc. at 39 ("[AMTA's] extensive experience with Part 90 licensing procedures prompts it to support the broadest possible use of first-come, first-served assignment schemes as being in the public interest.... [This system] has been employed without legal challenge for almost two decades, and has facilitated market entry by numerous entities representing a broad range of financial stature"); Comments of E.F. Johnson Company at 21 ("The Company supports retention of the first-come, first-served process for determining mutual exclusivity in existing services. Permitting competitive applications to be filed within 30 days ... will only encourage speculation and make it more difficult for legitimate providers to seek authorization for locations where they intend to offer service"). See also, Comments of the Committee for Effective Cellular Rules at 2 ("[B]ecause of the minimal likelihood of competing applications, FCFS procedures are more efficient that [*sic*] longer filing windows").

notice.[11/] Instead of a public notice seeking petitions to deny, the Commission need only publish an informative notice following the end of the amendment filing period, setting forth all pending applications and their specified frequencies.[12/]

C. Definition and Treatment of Modification Applications.

The Commission has proposed to limit modification applications to those which propose a new or relocated station within 2 kilometers of an existing site or which propose technical changes which would not increase the service contour. All applications not meeting this definition would be deemed "initial" applications and subject to auction in the case of mutual exclusivity.

Commenters were virtually unanimous in their opposition to the Commission's proposal. Most were concerned that adoption of

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11/ Specifically Section 22.23(g)(6) provides for an amendment to be treated as "minor" (and not subject to public notice) where it "does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing." Since pending applications caught in the logjam of conflicting applications are, by definition, already mutually exclusive, any frequency-specific amendment, even if ultimately found to be MXd with another frequency-specific proposal, may be deemed not to have created any "new" or "increased" conflicts. Indeed, as noted by SkyTel, it is possible that frequency conflicts which develop as a result of the amendments, could be resolved by the parties through a further Section 22.23(g)(2) amendment (one which "resolves frequency conflicts with other pending applications but does not create any new or increased frequency conflicts"), thereby avoiding the necessity to utilize the auction process in selecting the ultimate licensee. Where the conflicts cannot be resolved, however, PageNet supports the Commission's proposal to use the auction process to determine which application should be granted.

12/ See further discussion respecting treatment of pending applications *infra* at p. 11.

such a rule would subject too many applications to auction and hamper rational expansion of existing systems.[13/]

In PageNet's view, a 2-kilometer modification rule is unnecessary in the context of market-area licensing and a first-come, first-served licensing scheme.[14/] Even assuming, as one must, that the Commission did not intend such a definition to apply to so-called fill-in sites that are wholly internal to a wide-area, multi-station system, PageNet agrees with the vast majority of the commenters that the definition would unnecessarily restrict licensees' flexibility to expand their existing systems.

A far more reasonable standard would be one, as recommended by Metrocall and Paging Partners, whereby auctionable modifications (qua "initial" applications) would be those that propose sites having no overlap with (i.e., lying 20 miles or more from) any existing facility.[15/] This definition, though more expansive than that recommended by the Commission, would provide a more rational basis for system expansion. First-come, first-served application procedures, in combination with market-area licensing, would assure that there would be only the slightest

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13/ Metrocall at 5; PCIA at 6; Paging Partners at 5-6; SkyTel at 13.

14/ In the event the Commission does not adopt market-area licensing and, even more importantly, first-come, first-served filing procedures, PageNet recommends that any and all reasonable measures be taken to avoid the need to conduct comparative hearings to choose between conflicting applications. The 2-kilometer definition could, in such a world, be necessary to assure that most applications would be deemed "initial" and, therefore, subject to competitive bidding procedures.

15/ Metrocall at 8; Paging Partners at 6.

likelihood of conflicting applications that would require comparative hearing.

D. Treatment of Pending Applications.

In an effort to clean up the backlog of applications and to address issues raised in litigation relating to the licensing of frequencies in many major markets around the country, the Commission proposed that applicants having pending applications (including, as earlier noted, applications which have been granted, dismissed or denied but are subject to petitions for reconsideration or applications for review) would be required to amend their applications to specify a frequency and would be considered mutually exclusive, on a one-time-only basis, with co-channel applications either previously filed or filed within 60 days of the effective date of the new rules. Further, the Commission proposed to use the competitive bidding process to select between mutually exclusive applications.

Some commenters expressed concern that the Commission's proposal would create an avalanche of new applications, many of which might be mutually exclusive.[16/] Some alleged that new rules could not legally or in fairness be given retroactive applicability,[17/] while another urged that retroactivity could pass judicial scrutiny if the rules were sufficiently narrow in

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16/ PCIA at 5-6, Premiere Page at 5-6.

17/ Tri-State Radio at 9-17; Paging Partners at 3-4.

their focus.[18/] The proposed use of auctions to grant pending applications was supported by some, opposed by others.[19/]

PageNet vigorously opposes the Commission's proposal to open a 60-day filing window for the submission of additional, potentially-mutually exclusive applications. PageNet knows of no rule or statutory requirement, nor has the Commission cited any, that would require it to open such a window. Therefore, since it conflicts with the requirement to minimize the number of mutually exclusive applications, this proposal should be categorically rejected.[20/]

PageNet has concluded that the Commission should approach the processing of amended pending applications in the following manner and has circulated its proposal to others in the industry. The approach is very similar to one proposed by SkyTel for addressing the backlog of applications in the Northeast corridor.[21/]

As proposed by the Commission, each application, pending upon the effective date of the new rules, would be amended to specify a

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18/ SkyTel at 18 (frequency-specific application procedures should be used only to help resolve the logjam of applications in the Northeast corridor).

19/ AirTouch Paging at 14 (support); Tri-State Paging at 21, Premiere Page at 8, Paging Partners at 5 (oppose).

20/ In PageNet's view, the Commission has the discretion, which it should exercise here, to use competitive bidding procedures to resolve conflicts between "grandfathered" applications (i.e., those filed before July 26, 1993 as to which it may, but is not required, to use lottery procedures) and it need not and should not adopt a 60-day filing window, even on a one-time-only basis, on the theory that to do so would assure the appropriateness of using auctions.

21/ SkyTel at 17-18.

frequency.[22/] Those not amended would be dismissed. Once amended to specify a frequency, each application would be placed on public notice, pursuant to §309 of the Act, for the purpose of filing petitions to deny only.[23/] Taking each application in the order in which it was originally filed, and applying the original 60-day filing window triggered by the initial public notice of acceptance for filing, mutual exclusivity would be assessed by applying the standard 70-mile separation criteria. Co-channel applications within 70 miles would be deemed MXd and subjected to appropriate selection procedures.[24/] In this manner, no rights of any

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22/ Although not specifically addressed in the *Further Notice*, it is assumed that the applicant would be required, in filing its amendment, to show that the frequency is available as of the date the amendment is filed. While this gives applicants the benefit of any frequencies that may have become available since the time of initial filing, to require a showing that the frequency was available at the time of initial filing begs the question, since it would bring to bear all of the conflicting arguments raised by litigants in the pending proceedings. Thus, in making the showing that the frequency requested in the amendment is available, PageNet would suggest that the pool of frequencies include any that have not been granted to any licensee within 70 miles of the proposed site, and those that are the subject of a contested grant, as of the date the amendment is filed.

23/ While this would subject each application for a second time to the filing of such petitions, since the grounds for their filing would be limited virtually exclusively to claims of interference, the number of such petitions could be expected to be minimal, thus furthering the aims of a regulatory scheme that minimizes the potential for litigation as well as administrative or procedural delay. Alternatively, as stated above, the Commission could elect to apply Section 22.23(g)-type procedures, exempt the amended applications from the public notice requirements and issue only an informative notice listing the applications and the frequencies specified.

24/ In its comments, PageNet recommended use of an outside coordinator to assist in the processing of 931 MHz applications, in the same manner that 929 MHz private carrier paging applications are coordinated by NABER. Thus, to the extent that dealing with the analysis required to determine which amended applications are mutually exclusive would place an undue burden on the Commission's staff, the task could be delegated to such an

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applicant would be cut off that were not cut off upon expiration of the initial filing window under the rules in effect at the time of filing.

PageNet believes this approach would prove to be a fair and equitable means of dealing with the backlog of pending applications in a way that would not increase the Commission's processing burdens.

III. CONCLUSION

PageNet supports adoption of certain of the proposals set forth in the *Further Notice*. Howerever, it opposes adoption of those that would retain a 30- or 60-day filing window for competing applications and the restrictive definition of modification application which would encumber system expansion. For the reasons set forth above, frequency-specific application procedures should be adopted, along with state-wide market-area licensing and first-come, first-served processing rules, to assure that licensees can provide the highest quality, most cost-

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entity and the fee for such coordination service paid upon filing of the required amendment.

effective service as expeditiously as possible with minimal burdens on the Commission's resources.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lila A. Mitkiewicz, hereby certify that a copy of the foregoing ***Reply Comments of Paging Network, Inc.*** was sent, this 5th day of July 1994, by U.S. first-class mail to the following individuals:

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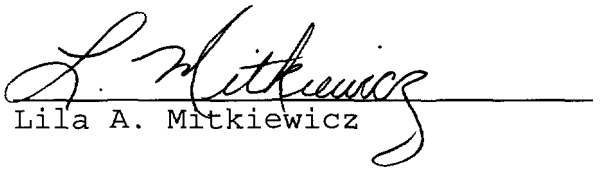

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* Delivered by Hand